IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 611.

THE IVANHOE BUILDING & LOAN ASSOCIATION OF NEWARK, N. J.,

Petitioner,

—against—

THOMAS A. ORR, Trustee of EASTERN SASH & DOOR COMPANY, Bankrupt,

Respondent.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONER.

In reply to respondent's supplemental brief, petitioner respectfully submits that:

The cases cited by respondent do not sustain his contentions, but rather support petitioner.

The very first case cited by respondent—*Green* v. *Stone*—54 New Jersey Equity 387, decided in our highest Court, employs significant language in petitioner's favor. In addition to the wording cited in respondent's brief, *in favor of the creditor,* the Court said, on page 395:

> "* * * The legal effect of such a covenant (to assume and pay the mortgage) is not

changed by the fact that the remedy upon it is sought in a court of equity. *The covenant has the same efficacy in a Court of equity as in a court of law,* * * *" (Words in parenthesis and italics ours.)

As to the second group of cases cited by respondent (p. 4, Supplemental Brief), the principle underlying all of these cases is that, *so long as the decree in the foreclosure suit and the confirmation of the sale thereunder stand undisturbed, the mortgagee may sue for and recover the entire deficiency.* In the case at bar the decree in the foreclosure suit was entered on June 20, 1932. The Sheriff's sale which was held on August 9, 1932 was confirmed by the Court of Chancery on August 20, 1932, and, up to the present time, neither said decree nor said confirmation of sale have been in any way questioned or attacked and they now stand undisturbed and in full force and effect.

It will thus be seen that even in a suit in equity petitioner would have been entitled to recover the *full amount* of the deficiency.

Respondent makes every effort to confuse the issues herein. He first contends that petitioner's claim should be considered as *in equity.* Then, in his oral argument, he cited a statute of the State of New Jersey which established a method of procedure in suits *at law,* and, although he admits that this statute was declared unconstitutional as to pre-existing contracts, he now again cites this statute (Chapter 82, Laws of 1933) in his supplemental brief (p. 5). This statute has no bearing upon the case at bar.

Although the Court below decided this case on the theory that Section 68 (a) of the Bankruptcy Act applies, with which he agrees in his main brief, respondent now seems to be dissatisfied with the theory

of the Court below and now contends that Section 57 (k) of the Bankruptcy Act governs this case. It is respectfully submitted that to allow petitioner to receive dividends on the full amount of its claim does not violate Section 57 (k) but in fact is treating the claim "according to the equities of the case".

Respondent puts the question, "Should petitioner be entitled to any greater right after bankruptcy than it had before?" It is respectfully submitted that petitioner is asking for no greater right than in equity and good conscience it is entitled to. According to the authorities petitioner is entitled to be made *whole*. To reduce the claim by the value of the property and pay dividends on the net amount only would have the effect of giving a preference and advantage to the other creditors. **Would this be treating the claim "according to the equities of the case?"** Most certainly not.

In his brief and argument in the Court below respondent argued that petitioner is a *secured* creditor. In his main brief herein (p. 11) he states that "We are not dealing in this case with a situation involving secured creditors." He now contends that "the question whether or not petitioner is a secured or unsecured creditor is beside the point" (p. 5, Supplemental Brief).

Petitioner emphatically contends that this question is of the utmost importance; that petitioner is an *unsecured* creditor, for the reason that bankrupt was not the owner of the property on the date of adjudication, and that Section 1 (23) of the Bankruptcy Act applies to and governs the case at bar.

It is only because petitioner *is an unsecured creditor* and because respondent knows that an unsecured creditor, not holding security on the property of the bankrupt, may prove the *entire* claim without deduc-

tion for the value of the security, that respondent is invoking these other theories.

At the oral argument petitioner referred to two cases, not cited in its main brief, and petitioner begs leave to mention them herein.

The first case is that of *In re Kinne, Bankrupt*, 5 Fed. 59, decided in 1880 in the District Court for the District of New Jersey. The second case is that of *Bankers' Trust Co.* v. *Irving Trust Co.*, 73 Fed. (2nd) 296, decided by Judge Manton in the Circuit Court of Appeals for the Second Circuit on November 5, 1934.

It is significant that the Trustee in the last mentioned case applied to this honorable Court for a writ of certiorari at this Term of the Court (#584) and that his application was denied.

Both of the above cases clearly bear out petitioner's contention that it is entitled to prove the full amount of its claim and receive dividends thereon.

As to the theory of the Court below that Section 68 (a) of the Bankruptcy Act applies to the case at bar, petitioner respectfully submits that there is not here presented a case of mutual debts or mutual credits.

In the case of *McDaniel Nat. Bank* v. *Bridwell*, 74 Fed. (2d) 331 (C. C. A. 8th), decided November 1934, the Court said, on page 332:

> "From the wording of this subsection it is evident that, before a creditor may enjoy the use of the set-off principle against the bankrupt's estate, two essential elements must be established: (1) Two debts must exist, one of the creditor and one of the bankrupt's estate. (2) These debts must be mutual, *i. e.*, the

creditor's debt must be owed to the estate of the bankrupt, and the estate's debt must be owed to this creditor.

* * * * * * * * *

If such conditions are not fulfilled and the required mutuality is lacking, set-off is impossible under the statute. * * *

* * * Case had parted with title to the money represented in the certificates. There was no mutuality of debts and credits between Case and the bank when the petition was filed which is the time when the right of set-off must be measured."

When we remember that the filing of the petition is the crucial time in all matters arising in Bankruptcy proceedings (when, as here, adjudication follows) then the error of the statement of the Court below that petitioner "owed the Bankrupt the value of the security", is strikingly apparent, for, on the date of adjudication herein petitioner did not owe the bankrupt anything.

Section 68(a) of the Bankruptcy Act does not, therefore, apply to the case at bar.

Petitioner respectfully submits that the decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

ABRAHAM ALBQUM,
Counsel for Petitioner.

ABRAHAM ALBOUM,
AARON NAROL,
On the Brief.